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Daniel S. Vijil v. Workforce Appeals Board, Utah Department of Workforce Services, and Smitty's Golden Steak : Brief of Respondent

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

DANIEL S. VIJIL,

Petitioner,

v.

WORKFORCE APPEALS BOARD, UTAH DEPARTMENT OF WORKFORCE SERVICES, AND SMITTY'S GOLDEN STEAK,

Respondents.

Case No. 20110160-CA

Priority No. 7

BRIEF OF RESPONDENT

Petition for Review of a Decision of the
Workforce Appeals Board of the
Department of Workforce Services,
State of Utah

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JURISDICTION OF THE COURT OF APPEALS

This Court has jurisdiction of this Petition for Review pursuant to Article 8, §5 of the Utah Constitution; Utah Code Ann., §§35A-4-508(8)(a), 78A-4-103(2)(a), 63G-4-403; and Rule 14 of the Rules of Appellate Procedure.

ISSUES PRESENTED FOR REVIEW

Did the Workforce Appeals Board have substantial evidence to support the finding the Claimant was discharged from his employment with just cause?

STANDARD OF REVIEW

The question of whether the Employer had just cause to terminate the Claimant is a mixed question of law and fact. *Johnson v. Dept. of Employment Sec.,* 782 P.2d 965, 968 (Utah Ct. App. 1993), *citing Law Offices of David Paul White v. Bd. of Review,* 778 P.2d 21, 23 (Utah Ct. App. 1989). In *Pro-Benefit Staffing v. Board of Review*, 775 P.2d 439, 443 (Utah Ct. App. 1989), this Court held that as to the determination of whether the Employer had just cause to discharge the Claimant: "we will not disturb the Board's application of its factual findings to the law unless its determination exceeds the bounds of reasonableness and rationality."

In *Gibson v. Department of Employment Sec.*, 840 P.2d 780, 783 (Utah Ct. App. 1992), this Court held: "[T]he legislature has granted the Board discretion in determining whether an employee was terminated for just cause. Accordingly, we will reverse the Board's decision only if we determine that it is unreasonable or irrational." [citations omitted]

The issue of just cause in a discharge is highly fact dependent and within the expertise of the Department; therefore, a "measure of discretion" should be granted. In the case of *Pacheco v. Bd. of Review of the Indus. Comm'n.*, 717 P.2d 712 (Utah 1986), the Utah Supreme Court noted in reviewing a mixed question of law and fact, "we defer to the informed discretion of the Commission and reverse only upon a plain abuse of discretion." *Id.* at 714.

STATUTES AND REGULATORY PROVISIONS AT ISSUE

The statutes and rules which are determinative in this matter are set forth verbatim in Addendum A, and include the following:

Utah Admin. Code R994-405-202

Utah Code Ann. §35A-4-307

Utah Code Ann. §35A-4-405(2)(a)

Utah Code Ann. §35A-4-508(8)(a)

Utah Code Ann §63G-4-403

Utah Code Ann. §78A-4-103

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below.

This is an appeal from an unemployment compensation decision by the Workforce Appeals Board (Board) of the Department of Workforce Services (Department).

The Claimant, Daniel S. Vijil, filed a claim for unemployment insurance benefits after his employment was terminated by the Employer, Smitty's Golden Steak. A decision was issued by a Department representative who found the Employer proved just cause for the discharge and the Claimant was denied benefits under the Utah Employment Security Act §35A-4-405(2)(a). (All Utah Code provisions are found sequentially at Addendum A, Department decision at Addendum B.) The Employer was relieved of benefit charges under Utah Code Ann. §35A-4-307.

The Claimant appealed the Department decision to an Administrative Law Judge (ALJ). After an evidentiary hearing at which both the Claimant and the Employer were present, the ALJ upheld the Department's decision. (Addendum C). The Claimant appealed to the Workforce Appeals Board. The Board upheld the decisions of the ALJ. (Addendum D). The Claimant then filed a Petition for Review seeking reversal of the Board's decision.

B. Statement of the Facts.

The Workforce Appeals Board supplements and corrects the Employer's Statement of the Facts as follows:

The Claimant worked as a cook for the Employer from June 6, 2006, until he was discharged on October 21, 2010. (R 023:17-25). On October 5, 2010, the Employer issued the Claimant a written warning regarding attendance issues. (R 009; 024:10-21; 029:29-42). The Claimant had been tardy 116 times from January 2010 to October 2010. (R 024:16-17; 029:20-27). When issuing the Claimant the written warning, the Employer told the Claimant that he must speak to a manager or the owner of the company for permission before taking time off work or trading shifts with other employees. (R 009; 024:10-21). He was also reminded that his shift started promptly at 2 p.m. (R 009). He was further notified that he could be discharged if the attendance problems continued. (R 009). The Claimant signed the written warning. (R 009; 027:28-29; 029:29-37).

The Claimant did not appear to work as scheduled on October 21, 2010. (R 024:3-26; 027:17-19). The Claimant did not get prior approval before taking the day off which was a direct violation of the written warning and the Employer's expectations. (R 023:35-44; 024: 1-21). The Claimant asked a co-worker to cover his shift. (R 024: 32-34; 028:3-6). That co-worker, however, could not appear to work until two to three hours after the Claimant's shift started. (R 024 34-37; 028:5-14; 029:3-18). The Employer was not aware the Claimant would be absent from work that day and was unaware the Claimant had found someone to partially cover his shift. (R 024:32-34). As such, the manager on duty had to scramble to find another employee to cover the shift. (R 025:18-

28). The Employer discharged the Claimant for failing to appear to work without proper notice. (R 023:35-43; 024:1).

SUMMARY OF ARGUMENTS

The Board correctly determined the Employer had just cause to discharge the Claimant based on substantial evidence in the record. Since the Employer had just cause to discharge the Claimant, the Claimant is ineligible for benefits. The Board's decision to deny benefits is reasonable and rational and supported by substantial evidence in the record. The Petition for Review should be denied.

On appeal to this Court, the Claimant argues the Board's findings, as to the elements of culpability and control of the just cause standard, are not supported by substantial evidence. Specifically, the Claimant argues the Board's credibility determination was erroneous. In addition, the Claimant argues the Employer was not harmed by his actions, therefore the element of culpability is not established. Further, the Claimant argues he did not have control because he lacked the ability to perform satisfactorily due to his depression. As such, the Claimant lastly argues the Board's conclusion of law that the Employer had just cause for discharging the Claimant is erroneous and constitutes an abuse of discretion.

The Claimant, however, has failed to show the Board's factual findings were unreasonable or irrational. The ALJ's determination of credibility, as adopted by the Board, was reasonable, rational, and supported by substantial evidence in the record. Further, the Board's application of the just cause standard to the facts was reasonable, rational, and supported by substantial evidence. The Claimant had knowledge of the Employer's expected conduct, the Claimant had complete control over the conduct

causing his discharge, and the Claimant's conduct jeopardized the Employer's rightful interests.

In addition, the Claimant failed to properly marshal all the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting evidence, the Board's findings are not supported by substantial evidence.

ARGUMENT

POINT I

THE BOARD'S DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

The ALJ and the Board heard the evidence presented by both parties and found the Employer sustained its burden of proof in showing just cause for the discharge. Those findings are based on competent and substantial evidence in the record. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Grace Drilling Co. v. Board of Review*, 776 P.2d 63, 68 (Utah Ct. App. 1989). [citations omitted] Substantial evidence is more than a "scintilla of evidence . . .though something less than the weight of the evidence." *Id. See also Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, 164 P.3d 384; *Prosper v. Dept. of Workforce Services*, 2011 UT App 246; and *Carradine v. Labor Comm'n*, 2011 UT App 212.

When applying the substantial evidence test, this Court holds that a party challenging the Board's findings of fact must marshal all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting evidence, the findings are not supported by substantial evidence. *Grace Drilling Co.*, 776 P.2d 63, 68.

When a case presents conflicting evidence the trier of fact is the appropriate entity to make determinations regarding credibility and the relative weight of the available evidence. In *V-1 Oil Co. v. Division of Envtl. Response & Remediation*, this Court held

"it is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences." 962 P.2d 93, 94 (Utah Ct. App. 1998), *citing Grace Drilling Co.*, 776 P.2d 63, 68.

The ALJ, as the trier of fact, must make a credibility determination whenever two parties give divergent testimony. Since the ALJ is in the unique position of being an active participant in the hearing, interacting with the parties and also questioning the witnesses, the ALJ's credibility finding should not be disturbed on appeal. This Court never enters into the realm of credibility; "the Board is simply in a much better position to judge the credibility of a witness than this Court." *Prosper v. Dept. of Workforce Services*, 2011 UT App 246, ¶4, n.2. In addition, this Court will not substitute its judgment as between two reasonably conflicting views, "even though [the Court] may have come to a different conclusion had the case come before [it] for de novo review." *V-1 Oil Co.*, 962 P.2d 93, 94, *citing Grace Drilling Co.* 776 P.2d 63, 68 (Utah Ct. App. 1989).

Here, the ALJ found the Employer's testimony to be more credible than the Claimant's testimony. The Claimant testified that he gave the manager and owner advance notice that he would be absent on October 21, 2010. (R 027:26-36). The Employer, however, provided credible testimony the Claimant did not obtain advance permission to miss work on that day and admitted to the Employer that he believed he only had to find coverage for a shift if he was absent. (R 023:43-44; 024:1-21; 025:34-43; 026:1-16). The ALJ found the Employer's testimony about the events to be more

reasonable and more likely to have occurred than the Claimant's testimony about the events. This conclusion is reasonable, especially considering the Claimant's long history of attendance problems and failure to notify the Employer in advance when he was going to be significantly late to work. (R 024:16-18; 029:20-27). There is substantial evidence in the record to support the ALJ's credibility determination. This determination should not be disturbed.

In addition, the Board found the Employer's testimony to be more credible because the Claimant's testimony was inconsistent. (R 053). The Claimant testified that he told the manager and owner he would be taking the day off in advance, but later testified that he called the restaurant shortly before his shift to let the Employer know he was going to be absent. (R 027:26-36; 028:33-35). The Claimant also stated on appeal to the Board he requested the day off on October 21, 2010, not one week prior to the absence, and left a message with the hostess about his impending absence. (R 044). The Board questioned why the Claimant would feel the need to call and inform the Employer of his absence if he had previously gained approval for the absence, based upon the inconsistency between the Claimant's testimony and his statements on appeal to the Board. (R 053; 054). This evidence combined with the credible testimony of the Employer is what this Court has described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that the Claimant did not gain prior approval for taking the day off on October 21, 2010.

Neither the ALJ nor the Board relied upon the Department's finding that the Claimant's statements were self-serving, as alleged by the Claimant. A hearing before an

Administrative Law Judge is a *de novo* hearing. That means that the hearing is a new hearing, and neither the ALJ nor the Board is bound in any way to the Department's original decision or credibility determinations. In order to preserve the integrity of the process and afford all parties an equal opportunity to present their case, both the ALJ and the Board are required to exercise independent judgment without regard to the desires of the Department. The ALJ and the Board relied upon the testimony and evidence provided in the hearing on this matter and not the conclusions of the original Department adjudicator.

POINT II

THE BOARD'S DECISION THAT THE EMPLOYER DISCHARGED THE CLAIMANT WITH JUST CAUSE WAS REASONABLE AND RATIONAL AND SHOULD BE UPHELD.

A claimant is not eligible for unemployment benefits if the Employer discharged him for just cause as defined in Utah Admin. Code R994-405-202. In establishing whether a claimant was discharged for just cause, the employer has the burden of proving: 1) the claimant's culpability, 2) his knowledge of expected conduct, and 3) that the offending conduct was within the claimant's control. Utah Admin. Code R994-405-202. *See also Bhatia v. Dept. of Employment Sec.*, 834 P.2d 574, 577 (Utah Ct. App. 1992); and *Gibson v. Dept. of Employment Sec.*, 840 P.2d 780, 783 (Utah Ct. App. 1992). The employer must establish each of the three elements in order for the Board to deny benefits. *Id.* Here, the Employer successfully proved all three elements.

A. The Employer proved the element of culpability because the Claimant's conduct left the Employer without a full staff.

In order to demonstrate the element of culpability, the Employer must show the conduct causing the discharge is so serious that continuing the employment relationship would jeopardize the employer's rightful interests. Utah Admin. Code R994-405-202(1).

Here, the Employer's rightful interests were jeopardized. The Claimant failed to work his scheduled shift without giving the Employer notice he would be absent. The Claimant jeopardized the Employer's rightful interests of maintaining order, control, and productivity in the workplace. An employer may rightfully expect an employee to report to work when scheduled and remain at work within the reasonable requirements set by

the employer. An employer may also rightfully expect employees to provide adequate notice of an absence. *See e.g., Pimentel v. Dept. of Workforce Servs.,* 2004 UT App 160.

The Claimant argues his conduct was not culpable based upon his testimony that he received prior approval for his absence from the owner and the manager. (R 027:26-36). The Claimant further relies upon his testimony that when he called the restaurant on the day in question, he did not call in to ask for time off, but simply to remind the staff that he would be gone during his shift that day. (R 028:33-41). The ALJ and the Board, however, did not find this testimony to be credible. The ALJ and the Board found the Employer's testimony that the Claimant did not gain prior approval for being absent to be the most credible. (R 033; 053).

This Court should not disturb the Board's determination of credibility. In *Prosper v. Dept. of Workforce Services*, this Court held it will not enter into the realm of credibility. "The Board is simply in a much better position to judge the credibility of a witness than this Court." 2011 UT App 246, ¶4, n.2. Further, this Court will not substitute its judgment as between two reasonably conflicting views, "even though [the Court] may have come to a different conclusion had the case come before [it] for de novo review." *Grace Drilling Co. v. Board of Review,* 776 P.2d 63, 69 (Utah Ct. App. 1989). Therefore, the ALJ's determination that the Claimant did not gain prior approval for his absence is a finding of fact that should not be disturbed by this Court. Thus, the Claimant's argument that he did gain approval for his absence is moot.

The Claimant further argues that he was not culpable because his conduct did not cause the Employer actual financial harm. The Claimant misunderstands the applicable

law. The unemployment rules provide that culpability will be found if a claimant's conduct "causing the discharge is so serious that continuing the employment relationship would jeopardize the employer's rightful interest." Utah Admin. Code R994-405-202(1). This rule does not mention financial harm, nor does it make it necessary for the employer to have suffered actual harm. The Employer need only show the conduct causing the discharge would jeopardize an employer's rightful interests. In this case, the Claimant failed to work his scheduled shift and failed to provide adequate notice of his absence. The Employer was harmed because it did not have the required amount of workers on duty. As a result, the Employer's ability to maintain order, control, and productivity in the workplace was jeopardized.

Additionally, the Claimant argues the Employer experienced no harm because the Claimant found someone to cover his shift. The primary person the Claimant asked to cover his shift, however, could not arrive to the restaurant until at least 4 p.m., two hours after the Claimant's shift was scheduled to start. The Claimant also acknowledged in his testimony that the secondary person he asked to cover a portion of his shift was already scheduled to work. (R 009:5-14, 010:3-18). The Employer planned to have two workers in the kitchen at 2 p.m., not one. A person who is already scheduled to work cannot "cover" a shift. When the Claimant failed to ensure two workers were present to work, he failed to cover the shift. In addition, the Claimant failed to inform the Employer that he found someone to cover part of his shift. His actions caused confusion and harmed the Employer's ability to ensure all the necessary work, like cleaning, was performed.

The Claimant lastly argues the Board's determination that the Claimant's repeated failure to work when scheduled jeopardized the Employer's rightful interests was not supported by substantial evidence. The Claimant alleges he did not repeatedly fail to work, but only failed to work one day since the date of his written warning, 16 days earlier. The Claimant admits that an employer's interests are harmed if an employee misses multiple days of work. However, he argues that since he only missed one full day of work, the Employer's interests were not jeopardized and the Board's determination was not supported by substantial evidence in the record.

When the Board made the determination that the Claimant repeatedly failed to work, the Board was not only considering the Claimant's absence on October 21, 2011, it was also considering the Claimant's lengthy record of being late to work. The Employer and the Claimant testified that he was regularly late to work. When an employee is late to work, he is, in essence, failing to work during the time he is absent. Thus, the Board's determination that the Claimant repeatedly failed to work when scheduled is supported by substantial evidence in the record. The Claimant's continued failure to work when scheduled jeopardized the Employer's rightful interests.

The Claimant's conduct jeopardized the Employer's rightful interests. As such, the Board's finding that the Employer established the element of culpability was reasonable, rational, and supported by substantial evidence.

B. The Employer proved the element of knowledge because the Claimant received a written warning that future attendance problems could lead to discharge.

In order to prove knowledge, an employer must show the claimant had knowledge of the conduct the employer expected. Utah Admin. Code R994-405-202(2).

The Claimant does not challenge the Board's finding that the Claimant had knowledge of the conduct the Employer expected. Both the Claimant and the Employer acknowledged at the hearing before the ALJ that the Claimant was given written notification of the Employer's expectations 16 days prior to the final incident which led to the Claimant's termination. The Board's finding that the Employer established the element of knowledge was reasonable, rational, and supported by substantial evidence.

C. The Employer proved the element of control because the Claimant had the capacity to notify the Employer that he intended to be absent from work and receive prior approval for his absence.

In order to establish the element of control, the Employer must show the conduct causing the discharge was within the Claimant's control. Utah Admin. Code R994-405-202(3)(a). "Evidence of a lack of care expected of a reasonable person in a similar circumstance may satisfy the element of control if the claimant has the ability to perform satisfactorily." *Id.*

The Claimant was in full control of the conduct that resulted in his discharge. The Claimant was not prevented in any way from complying with the Employer's expectation that he receive approval from the owner or one of the managers prior to being absent or trading shifts with another employee. The Claimant could have obtained prior approval to take a day off work. Since the Claimant was able to find someone to partially cover

his shift, it is reasonable to presume he could have found someone to cover his entire shift or notify the Employer he was unable to do so. The Claimant had the ability to perform satisfactorily, but instead he showed a "lack of care expected of a reasonable person."

The Claimant argues he did not have the ability to perform satisfactorily because he was struggling with depression and his medication was causing erratic behavior. This evidence is new evidence on appeal to this Court. Although the Claimant testified he went to the doctor to adjust his anti-depression medication and the Employer testified the Claimant's behavior was erratic, the Claimant *did not* testify before the ALJ that he was incapable of following the Employer's attendance expectations. In fact, although the ALJ and the Board found his testimony not to be credible, the Claimant has repeatedly stated that he *did* follow the Employer's expectations. In addition, the Claimant did not mention in his appeal to the Board that he was too impaired to follow the Employer's attendance expectations.

The Utah Supreme Court has consistently held that appellate courts generally do not consider new evidence on appeal. *Menzies v. Galetka*, 2006 UT 81 ¶51, 150 P.3d 480, 501 (Utah 2006). As such, the new evidence presented by the Claimant on appeal should not be considered by this Court.

Even if this Court were to consider this new evidence, the outcome should be the same: the Claimant was in full control of the conduct that resulted in his discharge. The Claimant, despite his depression and the adverse effects of his medication, was able to find someone to cover part of his shift. By doing so, the Claimant has shown that he was

capable of understanding the Employer's expectations and he had the ability to find someone to cover at least part of his shift. In addition, the Claimant testified he called into the restaurant just prior to the starting of his shift to inform management he would not be coming to work. By doing so, the Claimant has further shown he was capable of understanding the Employer's attendance expectations and had the ability of picking up a phone and calling one of the managers to gain permission for the day off. Clearly, the Claimant had the ability to follow the Employer's attendance expectations, despite his depression.

Even presuming the Claimant had a valid reason to miss the shift, the Claimant failed to exercise the level of care a reasonable person would exercise when needing to be absent from work. A reasonable person would notify his employer he needed to be absent from work. A reasonable person would also ensure he had secured coverage for the entire shift. The Claimant failed to take either reasonable step when missing work. The Claimant further had a history of being late to work and trading shifts without notice to the Employer, which is why the Employer issued the Claimant a final warning on October 5, 2010. (R 9; 10; 024:16-21).

The Board's finding that the Employer proved the elements of just cause is reasonable and rational and should be upheld.

POINT III

THE CLAIMANT FAILED TO PROPERLY MARSHALL THE EVIDENCE IN SUPPORT OF THE FACTUAL FINDINGS OF THE BOARD.

In finding the Employer met its burden of proving the Claimant was terminated for just cause, the Board relied on the provisions of the Employment Security Act, the Utah Rules of Evidence, and case law. In order to successfully challenge this finding, the Claimant "must demonstrate that the findings are not supported by substantial evidence when viewed in light of the whole record before the court." *Grace Drilling Co. v. Board of Review,* 776 P.2d 63, 68 (Utah Ct. App. 1989). The Court should reject the Claimant's appeal for his failure to properly marshal the evidence in support of his conclusion that the Board's findings were without foundation.

In *Crockett v. Crockett,* 836 P.2d 818 (Utah Ct. App. 1992), this Court refused to entertain the appellant's factual challenges since the appellant failed to meet its marshaling burden:

> [The Appellant] has neither marshaled the evidence in support of the finding nor demonstrated that the finding is clearly erroneous, but instead cites only evidence that supports the outcome she desires. *See Crookston v. Fire Ins. Exch.,* 817 P.2d 789, 800 (Utah 1991) (citing only evidence favorable to one's position "does not begin to meet the marshaling burden. . . ."). We therefore assume that the record supports the finding of the trial court.

Id. at 820.

This Court expanded upon the appellant's burden to marshal the evidence in *Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc.,* 872 P.2d 1051 (Utah Ct. App. 1994):

> Utah appellate courts do not take trial courts' factual findings lightly. We repeatedly have set forth the heavy burden appellants must bear when challenging factual findings.

Id. at 1052.

This Court reasoned that to successfully appeal a trial court's findings of fact, "appellate counsel must play the devil's advocate. '[Parties] must extricate [themselves] from the client's shoes and fully assume the adversary's position.'" *Id.* at 1053, citing *West Valley City v. Majestic Inv. Co.,* 818 P.2d 1311, 1315 (Utah Ct. App. 1991). The Court further explained that proper marshaling requires the challenger to:

> . . . present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. *West Valley City v. Majestic Inv. Co.,* 818 P.2d 1311, 1315 (Utah App. 1991); accord *In re Estate of Bartell,* 776 P.2d 885, 886 (Utah 1989); *State v. Walker,* 743 P.2d 191, 193 (Utah 1987); *Commercial Union Assocs. v. Clayton,* 863 P.2d 29, 36 (Utah App. 1993); *Ohline Corp. v. Granite Mill,* 849 P.2d 602, 604 (Utah App. 1993).

Oneida at 1053.

Then, after an appellant has established:

> . . . every pillar supporting their adversary's position, they then "must ferret out a fatal flaw in the evidence" and show why those pillars fail to support the trial court's findings. *West Valley City,* 818 P.2d at 1314. They must show the trial court's findings are "so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" *Bartell,* 776 P.2d at 886 (quoting *Walker,* 743 P.2d at 193).

Oneida at 1053.

The record below is supported by the evidence and entitled to a presumption of validity. In *Grace Drilling Company v. Board of Review,* 776 P.2d 63 (Utah Ct. App. 1989), this Court held

> . . . the 'whole record test' necessarily requires that a party challenging the Board's findings of fact must marshal all of the evidence supporting the findings and show that despite the . . . contradictory evidence, the findings are not supported by substantial evidence.

Id. at 67-68.

In the recent unemployment case of *Target Interact US, LLC v. Workforce Appeals Bd.*, 2010 UT App 255, this Court noted the employer failed to marshal the evidence on appeal stating:

> we note that Target's briefing is deficient in several respects and that these defects alone would be grounds for this court to decline to disturb the Board's decision. Of particular concern is Target's failure to marshal the evidence in support of the Board's decision. See generally *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶17 & n.3, 164 P.3d 384 ("To successfully challenge an agency's factual findings, the party must marshall [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." (alteration in original) (internal quotation marks omitted)). Target's central disagreement with the Board's decision is factual, and Target's failure to marshal the evidence in support of the Board's decision impermissibly shifts the burden of combing the record for supporting evidence onto this court.

Id. ¶3.

In *Kimball v. Kimball*, 2009 UT App 233, the Court explained that:

> If there is some supportive evidence, once that evidence is marshaled it is the challenger's burden to show the "fatal flaw" in that supportive evidence, *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991), and explain why the evidence is legally insufficient to support the finding. Examples of such legal insufficiency might include that testimony was later stricken by the court; that a document was used for impeachment only and had not been admitted as substantive evidence; that a document was not properly admitted because it did not qualify under the business record

> exception to the hearsay rule; and that testimony that seems to support a finding was recanted on cross-examination.
>
> The pill that is hard for many appellants to swallow is that if there is evidence supporting a finding, absent a legal problem--a "fatal flaw"--with that evidence, the finding will stand, even though there is ample record evidence that would have supported contrary findings. After all, it is the trial court's singularly important mission to consider and weigh all the conflicting evidence and find the facts. No matter what contrary facts might have been found from all the evidence, **our deference to the trial court's pre-eminent role as fact-finder requires us to take the findings of fact as our starting point, unless particular findings have been shown, in the course of an appellant's meeting the marshaling requirement, to lack legally adequate evidentiary support.**

Id. ¶20, n.5, emphasis supplied.

The Claimant here has not met the marshaling burden. The only evidence in the record the Claimant points to show the findings of the Board are so "against the clear weight of the evidence" that they are "clearly erroneous" is the Claimant's own testimony, which both the ALJ and the Board found not to be credible. The Claimant has further not shown that the evidence relied upon by the Board had some "fatal flaw" or was "legally insufficient to support the finding" as required.

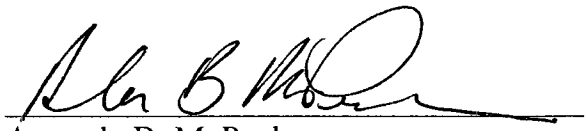
The Claimant further failed to marshal all of the evidence supporting the Board's decision. For example, the Claimant neglected to marshal the evidence that the Claimant's failure to notify the Employer of his plans to be absent and of his attempt to cover the shift, caused the Employer to scramble to cover the shift. (R 25:37-39). The Claimant also neglected to marshal the evidence that the Employer's other employees did not wish to stay to cover the Claimant's shift, potentially harming morale. (R 025:22-28). The Claimant also neglected to marshal the evidence that the Claimant admitted to the

Employer that he did not ask for approval of his absence because he thought he only had to cover his shift if he were to be absent. (R 025:34-38, 026:7-16). The Claimant in this case failed to meet his marshaling burden.

CONCLUSION

The Court should find the substantial evidence in the record supports the Board's determination that the Employer successfully established the elements of culpability, knowledge, and control. The Claimant was discharged with just cause and therefore is ineligible for benefits. The Claimant also failed to marshal the evidence in support of his appeal. The Board's decision was reasonable and rational. As such, the Board requests the Court deny the Claimant's appeal and affirm the Board's decision.

Respectfully submitted this 22nd day of August, 2011.



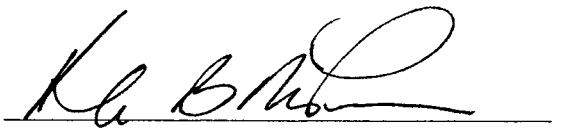
Amanda B. McPeck
Attorney for Workforce Appeals Board
Department of Workforce Services

CERTIFICATE OF MAILING

I CERTIFY that I mailed two copies of the foregoing Respondent's Brief, postage prepaid, to the following this 22nd day of August 2011:

DAVID J HOLDSWORTH
9125 S MONROE PLAZA WAY
SANDY UT 84070

PERSONNEL DEPARTMENT
SMITTY'S GOLDEN STEAK
540 S MAIN ST
MOAB UT 84532-2924



35A-4-307. Social costs -- Relief of charges.

(1) Social costs shall consist of those benefit costs defined as follows:

(a) Benefit costs of an individual will not be charged to a base-period employer, but will be considered social costs if the individual's separation from that employer occurred under any of the following circumstances:

(i) the individual was discharged by the employer or voluntarily quit employment with the employer for disqualifying reasons, but subsequently requalified for benefits and actually received benefits;

(ii) the individual received benefits following a quit which was not attributable to the employer;

(iii) the individual received benefits following a discharge for nonperformance due to medical reasons; or

(iv) the individual received benefits while attending the first week of mandatory apprenticeship training.

(b) Social costs are benefit costs which are or have been charged to employers who have terminated coverage and are no longer liable for contributions, less the amount of contributions paid by such employers during the same time period.

(c) The difference between the benefit charges of all employers whose benefit ratio exceeds the maximum overall contribution rate and the amount determined by multiplying the taxable payroll of the same employers by the maximum overall contribution rate is a social cost.

(d) Benefit costs attributable to a concurrent base-period employer will not be charged to that employer if the individual's customary hours of work for that employer have not been reduced.

(e) Benefit costs incurred during the course of division-approved training which occurs after December 31, 1985, will not be charged to base-period employers.

(f) Benefit costs will not be charged to employers if such costs are attributable to:

(i) the state's share of extended benefits;

(ii) uncollectible benefit overpayments;

(iii) the proportion of benefit costs of combined wage claims that are chargeable to Utah employers and are insufficient when separately considered for a monetary eligible claim under Utah law and which have been transferred to a paying state; and

(iv) benefit costs attributable to wages used in a previous benefit year that are available for a second benefit year under Subsection 35A-4-401(2) because of a change in method of computing base-periods, overlapping base-periods, or for other reasons required by law.

(g) Any benefit costs that are not charged to an employer and not defined in this subsection are also social costs.

(2) Subsection (1) applies only to contributing employers and not to employers that have elected to finance the payment of benefits in accordance with Section 35A-4-309 or 35A-4-311.

35A-4-405. Ineligibility for benefits.

Except as otherwise provided in Subsection (5), an individual is ineligible for benefits or for purposes of establishing a waiting period:

(2) (a) For the week in which the claimant was discharged for just cause or for an act or omission in connection with employment, not constituting a crime, which is deliberate, willful, or wanton and adverse to the employer's rightful interest, if so found by the division, and thereafter until the claimant has earned an amount equal to at least six times the claimant's weekly benefit amount in bona fide covered employment.

35A-4-508. Review of decision or determination by division -- Administrative law judge -- Division of adjudication -- Workforce Appeals Board -- Judicial review by Court of Appeals -- Exclusive procedure.

(8) (a) Within 30 days after the decision of the Workforce Appeals Board is issued, any aggrieved party may secure judicial review by commencing an action in the court of appeals against the Workforce Appeals Board for the review of its decision, in which action any other party to the proceeding before the Workforce Appeals Board shall be made a defendant.

63G-4-403. Judicial review -- Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

78A-4-103. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire, and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63G-3-602;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, parent-time, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63G, Chapter 4, Administrative Procedures Act, in its review of agency adjudicative proceedings.

R994. Workforce Services, Unemployment Insurance.

R994-405. Ineligibility for Benefits.

R994-405-202. Just Cause.

To establish just cause for a discharge, each of the following three elements must be satisfied:

(1) Culpability.

The conduct causing the discharge must be so serious that continuing the employment relationship would jeopardize the employer's rightful interest. If the conduct was an isolated incident of poor judgment and there was no expectation it would be continued or repeated, potential harm may not be shown. The claimant's prior work record is an important factor in determining whether the conduct was an isolated incident or a good faith error in judgment. An employer might not be able to demonstrate that a single violation, even though harmful, would be repeated by a long-term employee with an established pattern of complying with the employer's rules In this instance, depending on the seriousness of the conduct, it may not be necessary for the employer to discharge the claimant to avoid future harm.

(2) Knowledge.

The claimant must have had knowledge of the conduct the employer expected. There does not need to be evidence of a deliberate intent to harm the employer; however, it must be shown the claimant should have been able to anticipate the negative effect of the conduct. Generally, knowledge may not be established unless the employer gave a clear explanation of the expected behavior or had a written policy, except in the case of a violation of a universal standard of conduct. A specific warning is one way to show the claimant had knowledge of the expected conduct. After a warning the claimant should have been given an opportunity to correct the objectionable conduct. If the employer had a progressive disciplinary procedure in place at the time of the separation, it generally must have been followed for knowledge to be established, except in the case of very severe infractions, including criminal actions.

(3) Control.

(a) The conduct causing the discharge must have been within the claimant's control. Isolated instances of carelessness or good faith errors in judgment are not sufficient to establish just cause for discharge. However, continued inefficiency, repeated carelessness or evidence of a lack of care expected of a reasonable person in a similar circumstance may

satisfy the element of control if the claimant had the ability to perform satisfactorily.

(b) The Department recognizes that in order to maintain efficiency it may be necessary to discharge workers who do not meet performance standards. While such a circumstance may provide a basis for discharge, this does not mean benefits will be denied. To satisfy the element of control in cases involving a discharge due to unsatisfactory work performance, it must be shown the claimant had the ability to perform the job duties in a satisfactory manner. In general, if the claimant made a good faith effort to meet the job requirements but failed to do so due to a lack of skill or ability and a discharge results, just cause is not established.

FORM 615-J
REV 10/03

ADDENDUM B

UNEMPLOYMENT INSURANCE
DECISION OF ELIGIBILITY FOR
UNEMPLOYMENT INSURANCE BENEFITS

DATE MAILED: 11/18/10 ELECTRONIC

DCVP

DANIEL S VIJIL
PO BOX 1367
MOAB UT 84532-1367

SSN: XXX-XX-X272

EMPLOYER: SMITTYS GOLDEN STEAK

ice: This decision is made on your claim for benefits:

were discharged from your job for not following a reasonable policy, rule or instruction from your employer.

were discharged from your job for just cause. Your conduct was within your control and was adverse to your employer's ful interests. You had knowledge of your responsibilities to your employer or your employer's expectations and you knew or ld have known the possible adverse effects of your conduct on your employer.

efits are denied under Section 35A-4-405(2)(a) of the Utah Employment Security Act beginning October 31, 2010 and ending n you have earned wages in bona fide covered employment equal to at least six times your weekly benefit amount and you are rwise eligible. To reopen your claim, you can file on-line at jobs.utah.gov or you can call the Claim Center. This reopening will ffective as of the week you reopen your claim. You will be notified separately of any other issues on your claim.

HT TO APPEAL: If you believe this decision is incorrect, appeal by mail to: Utah Department of Workforce Services, Appeals ion, PO Box 45244, Salt Lake City, UT 84145-0244, or Fax (801) 526-9242, or online at www.jobs.utah.gov. Your appeal must n writing and must be received or postmarked on or before December 6, 2010. An appeal received or postmarked after ember 6, 2010 may be considered if good cause for the late filing can be established. Your appeal must be signed by you or legal representative. MAKE SURE YOUR NAME IS WRITTEN LEGIBLY AND THAT YOU INCLUDE YOUR SOCIAL URITY NUMBER AND CURRENT ADDRESS. Also, please state the reason for your appeal. A copy of your appeal will be to any other interested parties. It is very important for you to continue to file your weekly claims while the appeal process is ding. You will not be paid for any weeks not filed timely unless you can show good cause for late filing.

H CLAIMS CENTER PHONE NUMBERS: S.L.: 526-4400, Ogden: 612-0877, Provo: 375-4067, Out of Area: (888) 848-0688.

R. K Hintze

EMP.#: 1000516

DO NOT WRITE BELOW THIS LINE

13802897

Form APDEC
01

DEPARTMENT OF WORKFORCE SERVICES
APPEALS UNIT

Decision of Administrative Law Judge

Appellant

DANIEL J VIJIL
PO BOX 1367
MOAB UT 84532-1367

Respondent

SMITTYS GOLDEN STEAK
540 S MAIN STREET
MOAB UT 84532-2924

S.S.A. NO: XXX-XX-2272 **CASE NO:** 10-A-18673

APPEAL DECISION: Benefits are denied.
The Employer is relieved of charges.

CASE HISTORY:

Appearances:	Claimant/Employer		
Issues to be Decided:	35A-4-405(2)(a)	-	Discharge
	35A-4-307	-	Employer Charges

The original Department decision denied unemployment insurance benefits on the grounds the Claimant was discharged for just cause. That decision also relieved the Employer's benefit ratio account for benefits paid to the Claimant.

APPEAL RIGHTS: The following decision will become final unless, within **30 days** from **December 21, 2010,** further written appeal is received by the Workforce Appeals Board (PO Box 45244, Salt Lake City, UT 84145-0244; FAX 801-526-9244; or online at http://www.jobs.utah.gov/appeals) setting forth the grounds upon which the appeal is made.

FINDINGS OF FACT:

Prior to filing a claim for unemployment insurance benefits effective October 31, 2010, the Claimant last worked for Smittys Golden Steak from June 6, 2006, to October 21, 2010. The Claimant worked as a cook earning $12 per hour. The Claimant was separated from the Employer for the reasons described below.

On October 5, 2010, the Claimant received a written warning from the Employer regarding attendance related issues as well as issues regarding job performance. At that time the Claimant was informed that he was required to speak to a manager or the owner of the company in order to have time off work. The Claimant was told that if he did not improve in these areas he would be terminated.

On October 21, 2010, the Claimant did not work his scheduled shift. The Claimant had not spoken to a manager or the owner to take time off work that day. The Claimant knew that he was also required to cover his entire shift. The Claimant did not arrange for someone to cover his entire shift that day. When the Claimant went to a doctor's appointment that day. Because the Claimant did not have prior approval to take time off and did not cover his entire shift, the Employer made the decision to discharge the Claimant.

When the Claimant did not have prior approval to take time off work from a manager or the owner it made it difficult for the Employer to find someone to cover the Claimant's shift and complete the necessary work.

During the last year of the Claimant's employment the Claimant worked 169 days and was late to work 116 days.

REASONING AND CONCLUSIONS OF LAW:

Unemployment insurance benefits must be denied if the employer had just cause for discharging the employee. In order to have just cause for discharge pursuant to Section 35A-4-405(2)(a) of the Utah Employment Security Act, there must be fault on the part of the employee involved. The basic factors as established by the rules pertaining to Section 35A-4-405(2)(a), which are essential for a determination of ineligibility under the definition of just cause, are:

> (a) Culpability. The conduct causing the discharge must be so serious that continuing the employment relationship would jeopardize the employer's rightful interests . . .
>
> (b) Knowledge. The worker must have had a knowledge of the conduct which the employer expected . . .
>
> (c) Control. The conduct causing the discharge must have been within the claimant's control . . .

The Employer has a rightful interest in requiring employees to obtain prior approval before taking time off work. The Employer also has a rightful interest in requiring employees to cover their entire shift if they are going to be absent. These policies are necessary and reasonable in order to maintain order, control, and productivity in the workplace. The Administrative Law Judge found the Employer's testimony to be more credible than the Claimant's testimony regarding the final incident. The Employer's testimony was more reasonable and more likely to have occurred than the Claimant's testimony. The Administrative Law Judge found the Employer provided credible testimony by stating that when the Claimant was spoken to about the final incident he indicated to the Employer that he believed he only had to cover his shift rather than having prior approval to take time off work. The Claimant's conduct was directly contrary to the Employer's rightful interests. The Claimant had a history of attendance related problems and had been warned about these problems in the same month of his separation. The Administrative Law Judge finds the Claimant's conduct was so serious that continuing the employment relationship would have jeopardized the Employer's rightful interests. The element of culpability is established.

The Claimant was aware of the conduct expected of him by the Employer. The Claimant received a warning regarding attendance related issues including being warned that he must obtain prior approval from management in order to take time off work. The element of knowledge is established.

The Claimant was in full control of the conduct and circumstances that resulted in his discharge. The Claimant could have ensured that he obtained prior approval to take time off work. The Claimant was not prevented in any way from complying with the Employer's policy. The element of control is established.

The Employer has established by a preponderance of the evidence the elements of culpability, knowledge, and control. Just cause is established. Benefits are denied.

An Employer may be relieved of charges when the Claimant was separated from employment for reasons which would have resulted in a denial of benefits under Section 35A-4-405(1) or Section 35A-4-405(2) of the Utah Employment Security Act. In this case the reason for the Claimant's separation is disqualifying, therefore, the Employer is relieved of charges.

DECISION AND ORDER:

The Department representative's decision denying unemployment insurance benefits pursuant to Section 35A-4-405(2)(a) of the Utah Employment Security Act is affirmed. Benefits are denied effective October 31, 2010, and continuing until the Claimant has earned at least six times his weekly benefit amount in bona fide covered employment and is otherwise eligible.

The Employer is relieved of liability for charges in connection with this claim, as provided by Section 35A-4-307 of the Utah Employment Security Act.

Gary S. Gibbs
Administrative Law Judge
DEPARTMENT OF WORKFORCE SERVICES

Issued: **December 21, 2010**

GSG/kf

Form BRDEC
Issue 01

WORKFORCE APPEALS BOARD
Department of Workforce Services
Division of Adjudication

DANIEL S. VIJIL, CLAIMANT
S.S.A. No. XXX-XX-2272 :

: Case No. 11-B-00006

SMITTY'S GOLDEN STEAK, :
EMPLOYER

DECISION OF WORKFORCE APPEALS BOARD:
The decision of the Administrative Law Judge is affirmed.
Benefits are denied.
The Employer is relieved of benefit charges.

HISTORY OF CASE:

In a decision dated December 21, 2010, Case No. 10-A-18673, the Administrative Law Judge affirmed the Department decision and denied unemployment insurance benefits to the Claimant effective October 31, 2010. The Employer, Smitty's Golden Steak, was eligible for relief of benefit charges in connection with this claim.

JURISDICTION OF WORKFORCE APPEALS BOARD:

The Workforce Appeals Board has authority to review the Administrative Law Judge's decision pursuant to §35A-4-508(4) and (5) of the Utah Employment Security Act and the Utah Administrative Code (1997) pertaining thereto.

CLAIMANT APPEAL FILED: January 3, 2011.

ISSUES BEFORE WORKFORCE APPEALS BOARD AND APPLICABLE PROVISIONS OF UTAH EMPLOYMENT SECURITY ACT:

1. Did the Employer have just cause for discharging the Claimant pursuant to the provisions of §35A-4-405(2)(a)?

2. Is the Employer eligible for relief of charges pursuant to the provisions of §35A-4-307(1)?

FACTUAL FINDINGS:

The Administrative Law Judge's findings of fact contains a typographical error. The second to last sentence in the first paragraph of the second page of the decision should read: The Claimant went to a doctor's appointment that day.

REASONING AND CONCLUSIONS OF LAW:

The Claimant began working for this Employer in June 2006 as a cook. The Claimant was late to work over 100 times between January 2010 and October 2010. On October 5, 2010, the Employer issued the Claimant a written warning regarding several concerns, including attendance. The warning advised the Claimant that he must speak to a manager or the owner of the company for permission before taking time off work or "trading" shifts with other employees. The warning reminded the Claimant that his shift started at 2 p.m. The warning indicated that the Claimant would be discharged if the attendance problems continued. The Claimant signed the warning.

The Claimant did not appear to work as scheduled on October 21, 2010. He asked a coworker to cover his shift. That coworker could not appear to work until at least 4 p.m. The Employer was not aware that the Claimant would be absent from work that day and was unaware that the Claimant had asked anyone to cover his shift. The manager had difficulty finding another employee to cover the shift. The Claimant called the restaurant shortly before his shift was to begin and advised the hostess that he would be absent. The Employer discharged the Claimant for failing to appear to work without proper notice.

The Department and the Administrative Law Judge found the Employer had just cause to discharge the Claimant. The Claimant then appealed to the Board.

On appeal to the Board, the Claimant makes several new allegations regarding the circumstances which led to the written warning, the reason he was often late to work, his discussions with the Employer about his discharge, his belief that the Employer was prejudiced against him, and his suspicion that the Employer employs workers who are not authorized to work in the United States and favors those employees. These allegations were not raised during the hearing before the Administrative Law Judge. The Claimant also provided new documentation on appeal to the Board, including a letter allegedly signed by a "Bonnie Hammer" and a medical excuse note from Utah Navajo Health Systems.

Prior to the hearing the parties were sent an appeal brochure explaining the hearing procedure. The brochure also advises parties on how to prepare for a hearing and says, in part:

> **PREPARATION FOR THE HEARING**
> The hearing before the ALJ is your **only** chance to present everything relevant to the case. A record of the hearing will be made, and the ALJ may consider only the evidence introduced during this hearing. Further review and decisions on appeal are limited solely to the evidence introduced at this hearing.
>
> Take time to prepare for your hearing. Know the issue or issues involved. Obtain documents that help prove your facts and provide them to the ALJ and opposing party. Also, be sure to line up witnesses which support your side of the case. To

help you remember what you want to present at the hearing, you may prepare a simple outline or written summary with the key information you want to present.

Prepare all evidence and be ready to explain company records, abbreviations, technical terms, and/or symbols. **Do not rely solely upon written statements of witnesses as part of your evidence presentation. Have witnesses available to testify.** (See Witnesses and Subpoenas.) . . .

WITNESSES AND SUBPOENAS

If you need witnesses to help you present your case, contact them immediately to arrange for their appearance. Be sure they are available to participate in the hearing by telephone. If they are not available to participate, you may be able to reschedule the hearing. If the witnesses must participate by telephone at another location, have those numbers available for the ALJ. . . .

Before you ask witnesses to come to the hearing, be sure you need their testimony. **The best witnesses are those who were personally involved in the events and circumstances which are being explained to the ALJ. When a witness testifies about what someone else said happened, this is "hearsay" and is not very helpful in making a decision.** "Hearsay" is any statement, whether oral or in writing, made by a person who does not personally appear to testify under oath in the hearing. Hearsay is admissible in the hearing, but is not persuasive if contested.

No finding of fact or decision may be based solely on uncorroborated, hearsay evidence. Hearsay evidence carries less weight and credibility than does firsthand testimony, especially if the other party disputes that information. You should have the witnesses themselves who made the statement and/or observations available to testify during the hearing and try not to rely upon documents or witnesses who have no firsthand knowledge of events.

If you are not sure whether you need a witness, call the Appeals Unit. [emphasis in original]

The notice of hearing which was sent to the parties also included the following instructions:

ABOUT THE HEARING: The hearing is your opportunity to present ALL testimony and evidence on the issues. In the event of a further appeal, testimony and evidence that could have been presented at the original hearing may not be allowed. . . .

DOCUMENTS: Enclosed are documents that may be made part of the hearing record. . . .

> If you have additional documents to be considered by the judge, you MUST mail, fax, or hand-deliver the documents to the judge and **all other parties at least three days before** the hearing. . . .
>
> **Documents not provided in a timely manner may not be considered by the Judge.**
>
> **WITNESSES**: If you wish to have someone testify, you must arrange for that person to be available at the time of the hearing. The best witness has firsthand knowledge of what he or she is testifying about. . . .
>
> **IF YOU HAVE ANY QUESTIONS PERTAINING TO THE HEARING, CALL THE APPEALS UNIT AT 801-526-9300 or 877-800-0671.** [emphasis in original]

The Administrative Law Judge also told the parties at the beginning of the hearing to be sure to present all the evidence the party wanted to be considered during the hearing. When the Administrative Law Judge asked the Claimant at the close of the hearing if he had any more testimony he would like to provide, the Claimant replied that he did not.

Department rules provide:

> **R994-508-305. Decisions of the Board.** . . .
>
> (2) Absent a showing of unusual or extraordinary circumstances, the Board will not consider new evidence on appeal if the evidence was reasonably available and accessible at the time of the hearing before the ALJ.

The reason for this rule is that an appeal to the Board is an appeal on the record. That means that the Board reviews the evidence before the Administrative Law Judge and not new evidence. Providing evidence after the hearing deprives the other party of the opportunity to cross-examine witnesses and provide rebuttal evidence, if available. The right of cross-examination and the right to rebut evidence are important due process rights that must be protected.

Courts and administrative bodies are charged with the responsibility of resolving disputes between individuals. Parties to a lawsuit or administrative procedure have the right to know that the dispute will reach finality at some point in time. To ensure that the rights of all parties are protected, courts and administrative bodies set trials and hearings so that the parties might fully present any and all evidence and arguments in support of their position. After the hearing or trial no new evidence can be accepted except under unusual circumstances as explained in the rule mentioned above. Although the Board understands that to an inexperienced party the rules seem overly technical, those rules are necessary. Many if not most losing parties would want a new hearing to try and present a "better" case. If the Board granted those requests it would unnecessarily delay and burden the hearing process.

The new evidence presented by the Claimant on appeal was available at the time of the hearing. The Claimant was given the opportunity to present that evidence at the time of the hearing and has not explained why he did not provide this evidence before now. The Claimant has not presented any evidence of extenuating circumstances which would warrant accepting this new evidence now. The Board also notes that the medical excuse note appears to have been altered. The new evidence presented by the Claimant on appeal was not considered in reaching this decision.

The Board now turns to the merits of the case. The Claimant argues he should be eligible for benefits because his manager advised him to apply for unemployment insurance benefits. All unemployed persons are encouraged to apply for unemployment insurance benefits; however, only claimants who are eligible for benefits may actually receive them. The Department determines whether any particular claimant is eligible for benefits based on the laws and rules governing the program. It was appropriate for the Claimant's manager to instruct him to apply for benefits, but her instruction does not make the Claimant eligible for benefits.

To be eligible for benefits, a claimant must have been separated from his or her last employer for nondisqualifying reasons. Under the rules governing the unemployment insurance program, if a claimant was discharged for just cause, that claimant is disqualified from receiving benefits until he or she earns requalifying wages. To establish just cause to discharge a claimant, an employer must establish all three elements of a just cause discharge, which are culpability, knowledge, and control.

Department rules provide:

> **R994-405-202. Just Cause.**
>
> To establish just cause for a discharge, each of the following three elements must be satisfied:
>
> (1) Culpability.
>
> The conduct causing the discharge must be so serious that continuing the employment relationship would jeopardize the employer's rightful interest. If the conduct was an isolated incident of poor judgment and there was no expectation it would be continued or repeated, potential harm may not be shown. The claimant's prior work record is an important factor in determining whether the conduct was an isolated incident or a good faith error in judgment. An employer might not be able to demonstrate that a single violation, even though harmful, would be repeated by a long-term employee with an established pattern of complying with the employer's rules. In this instance, depending on the seriousness of the conduct, it may not be necessary for the employer to discharge the claimant to avoid future harm.

(2) Knowledge.

The claimant must have had knowledge of the conduct the employer expected. There does not need to be evidence of a deliberate intent to harm the employer; however, it must be shown the claimant should have been able to anticipate the negative effect of the conduct. Generally, knowledge may not be established unless the employer gave a clear explanation of the expected behavior or had a written policy, except in the case of a violation of a universal standard of conduct. A specific warning is one way to show the claimant had knowledge of the expected conduct. After a warning the claimant should have been given an opportunity to correct the objectionable conduct. If the employer had a progressive disciplinary procedure in place at the time of the separation, it generally must have been followed for knowledge to be established, except in the case of very severe infractions, including criminal actions.

(3) Control.

(a) The conduct causing the discharge must have been within the claimant's control. Isolated instances of carelessness or good faith errors in judgment are not sufficient to establish just cause for discharge. However, continued inefficiency, repeated carelessness or evidence of a lack of care expected of a reasonable person in a similar circumstance may satisfy the element of control if the claimant had the ability to perform satisfactorily.

(b) The Department recognizes that in order to maintain efficiency it may be necessary to discharge workers who do not meet performance standards. While such a circumstance may provide a basis for discharge, this does not mean benefits will be denied. To satisfy the element of control in cases involving a discharge due to unsatisfactory work performance, it must be shown the claimant had the ability to perform the job duties in a satisfactory manner. In general, if the claimant made a good faith effort to meet the job requirements but failed to do so due to a lack of skill or ability and a discharge results, just cause is not established. . . .

R994-405-208. Examples of Reasons for Discharge.

In the following examples, the basic elements of just cause must be considered in determining eligibility for benefits. . . .

(2) Attendance Violations.

(a) Attendance standards are usually necessary to maintain order, control, and productivity. It is the responsibility of a claimant to be punctual and remain at work

> within the reasonable requirements of the employer. A discharge for unjustified absence or tardiness is disqualifying if the claimant knew enforced attendance rules were being violated. A discharge for an attendance violation beyond the claimant's control is generally not disqualifying unless the claimant could reasonably have given notice or obtained permission consistent with the employer's rules, but failed to do so.
>
> (b) In cases of discharge for violations of attendance standards, the claimant's recent attendance history must be reviewed to determine if the violation is an isolated incident, or if it demonstrates a pattern of unjustified absence within the claimant's control. The flagrant misuse of attendance privileges may result in a denial of benefits even if the last incident is beyond the claimant's control.

The first element of a just cause discharge is culpability. To establish culpability, the Employer must show the Claimant was engaging in conduct that was harmful to the Employer's rightful interest, and discharge was necessary to protect that interest. The Claimant was discharged after he failed to appear to work without proper notice. An employer can rightfully expect an employee to report to work when scheduled and remain at work within the reasonable requirements set by the employer. An employer can also rightfully expect employees to provide adequate notice of an absence.

The Administrative Law Judge found the Employer's testimony that the Claimant failed to obtain permission for his October 21, 2010, absence more credible than the Claimant's testimony that he notified the manager and owner he would be absent that day. The Claimant challenges the Administrative Law Judge's credibility determination on appeal and again asserts that he notified the Employer of his doctor's appointment and the Employer gave him permission to be absent.

That the Claimant disagrees with the Administrative Law Judge's conclusion is not surprising. Parties that end up on the unfavorable side of a credibility determination are generally disappointed. Whenever two parties give divergent testimony, a credibility determination must be made. It is the duty of the Administrative Law Judge to consider conflicting testimony and determine which party is more credible. Since the Administrative Law Judge is in the unique position of being an active participant in the hearing, interacting with the parties and also questioning the witnesses, the Administrative Law Judge's credibility finding will not be disturbed on appeal. If there is evidence in the record to support the credibility finding made by the Administrative Law Judge, the Board will not substitute its own judgment for that of the Judge unless there is a clear showing of error.

There is ample evidence in the record to support the Administrative Law Judge's credibility determination. Furthermore, the Claimant's own account of the final incident is inconsistent. Although the Claimant alleges he advised the manager and owner he would be taking a day off several weeks in advance, he admits calling the Employer shortly before the shift to tell the manager he would be absent. He states on appeal, "I believe it was not my fault the message never got to them because I did leave one." The Board questions why the Claimant would need to call the

Employer and leave a message for the manager on the day of the absence if the absence was prearranged. There is no showing of error, and the Board will not alter the findings of fact.

The Claimant next argues that he had made arrangements to cover his shift. The person the Claimant asked to cover his shift, however, could not arrive to the restaurant until at least 4 p.m., when the Claimant's shift started at 2 p.m. The Claimant failed to provide coverage for his entire shift. The Claimant's testimony clearly demonstrates that he failed to cover his entire shift because he did not believe it was important for him to do so:

JUDGE When you cover your shift, are you supposed to cover the entire shift?

CLAIMANT Yeah.

JUDGE Okay. Now isn't it true that Fernando wasn't able to cover your entire shift?

CLAIMANT But I had another lead cook there. Elpillio was there.

JUDGE Was he supposed to work that time anyway?

CLAIMANT Yes.

JUDGE Because he wasn't covering your shift, right; he was covering his own shift?

CLAIMANT But he agreed to cover until I got - until Fernando got there.

JUDGE But didn't he have to work his own shift as well?

CLAIMANT Yeah, but from 2:00 until 4:00 is - there's nothing going on. So all we pretty much do - we clean or we just sit out back.

The Claimant did not cover his shift as required; at best, he covered part of his shift. His actions caused confusion and harmed the Employer's ability to ensure all the necessary work, like cleaning, was performed.

The Claimant next argues that his conduct was not culpable because he was a good worker who helped cover other employees' shifts. This argument, however, is immaterial as the Claimant was not discharged for performance issues. The Claimant was discharged due to a continuing pattern of failing to appear to work as expected without notice. The Claimant's repeated failure to work when scheduled jeopardized the Employer's rightful interests by harming its ability to efficiently run the restaurant. The Claimant further failed to obtain permission consistent with Employer's rules for his

absence from work or provide coverage for his entire shift. The Employer established the element of culpability.

The next element of a just cause discharge is knowledge. To prove the element of knowledge, the Employer must show that the Claimant had knowledge of the conduct the Employer expected. Generally, knowledge may not be established unless the Employer gave a clear explanation of the expected behavior. The Claimant was given written notification of the Employer's expectations. The Employer established the element of knowledge.

The final element of a just cause discharge is control. The Claimant argues on appeal to the Board that he was unable to show he did not have control over the final incident because he was unable to secure testimony from certain witnesses. He alleges that the Employer threatened his former coworkers and prevented them from testifying on the Claimant's behalf. The Claimant specifically refers to potential testimony from the coworker who agreed to cover part of the Claimant's shift and another coworker who allowed the Claimant to use his phone. The Claimant argues that he needed the testimony of those witnesses to prove that he had arranged for coverage of his shift.

The testimony of these witness was not necessary, however, because the Claimant provided his own testimony of the events. He testified that the coworker who agreed to cover his shift could not cover his entire shift, only a portion of the shift. Further, the Judge found the Claimant's testimony that he called the restaurant on the day of the final incident to be credible.

The Claimant could have chosen to find a coworker who could cover his entire shift. He also could have requested permission for the absence from the manager or the owner as directed, instead of attempting to call the manager shortly before his shift was to begin. The Employer established the element of control.

The Claimant finally argues that the Employer discharged him without just cause because the Claimant heard he was discharged from coworkers before the Employer notified him of the decision. How an employee learns that he or she has been fired rarely has any impact on the just cause analysis. In this case, the Employer discharged the Claimant because he was absent from work. Had the Claimant been present for the Employer to speak to him, he would not have been fired. Although it was imprudent for the Employer to tell the Claimant's coworkers about the decision before telling him, the error is immaterial. The Employer established all three elements of a just cause discharge; therefore, the Employer established just cause to discharge the Claimant.

The decision denying benefits and relieving the Employer of charges is affirmed. The Board adopts the Administrative Law Judge's reasoning and conclusions of law in full.

DECISION:

The decision of the Administrative Law Judge denying unemployment insurance benefits to the Claimant effective October 31, 2010, under the provisions of §35A-4-405(2)(a) of the Utah Employment Security Act, is affirmed.

The Employer, Smitty's Golden Steak, is eligible for relief of benefit charges in connection with this claim, as provided by §35A-4-307(1) of the Act.

APPEAL RIGHTS:

Pursuant to §63-46b-13(1)(a) of the Utah Administrative Procedures Act, you may request reconsideration of this decision within 20 days from the date this decision is issued. Your request for reconsideration must be in writing and must state the specific grounds upon which relief is requested. The request must be filed with the Workforce Appeals Board at 140 East 300 South, Salt Lake City, Utah, or may be mailed to the Workforce Appeals Board at P.O. Box 45244, Salt Lake City, Utah 84145-0244. A copy of the request for reconsideration must also be mailed to each party by the person making the request. If the Workforce Appeals Board does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied pursuant to §63-46b-13(3)(b) of the Utah Administrative Procedures Act. The filing of a request for reconsideration is not a prerequisite for seeking judicial review of this order. If a request for reconsideration is made, the Workforce Appeals Board will issue another decision. This decision will set forth the rights of further appeal to the Court of Appeals and time limitation for such an appeal.

You may appeal this decision to the Utah Court of Appeals. Your appeal must be submitted in writing within 30 days of the date this decision is issued. The Court of Appeals is located on the fifth floor of the Scott M. Matheson Courthouse, 450 South State Street, P. O. Box 140230, Salt Lake City, Utah 84114-0230. The appeal must show the Workforce Appeals Board, Department of Workforce Services and any other party to the proceeding as Respondents. To file an appeal with the Court of Appeals, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to §35A-4-508(8) of the Utah Employment Security Act; §63-46b-16 of the Utah Administrative Procedures Act; and Rule 14 of the Utah Rules of Appellate Procedure, followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Utah Rules of Appellate Procedure.

WORKFORCE APPEALS BOARD

Date Issued: January 27, 2011

TH/CN/DW/GG/AM/cd

MAILING CERTIFICATE

I hereby certify that I caused a true and correct copy of the foregoing DECISION to be served upon each of the following on this 27th day of January, 2011, by mailing the same, postage prepaid, United States mail to:

DANIEL S VIJIL
PO BOX 1367
MOAB UT 84532-1367

PERSONNEL DEPARTMENT
SMITTYS GOLDEN STEAK
540 S MAIN ST
MOAB UT 84532-2924

Smitty's

Golden Steak Restaurant

October 5, 2010

Regarding the employment of Danny Vijil

Danny,

This letter is to make certain you understand the policies we have set forth as your employers. These policies are made to insure the success of not only our business, but also you.

There are several issues that need immediate attention:

You are consistently late for work – anywhere from 15 minutes to an hour. Your current schedule requires you to be here at 2:00 pm. You must start immediately being on time. When you arrive at work, you need to be ready to work. *You must leave your personal issues at home and concentrate on your job.*

You consistently call people to work for you or trade you. From now on time off or trading must be approved by John, Lindsay or Teresa. There will be no more overtime. You have the same schedule each week and you must make arrangements to be here when scheduled and again, on time.

We have many complaints about you burning food. Do not turn up temperatures to cook food faster and your attention must be on the food on the grill, not elsewhere. Yesterday you sent out 11 steaks to one table and 10 were overdone and several were sent back to recook, a couple of those 3 times. We have customers that refuse to come in on your shift because of this. We received a call from the tour company that you served on Sunday night and they were very upset. It took too long to get their meal and you refused to cook the last steak which caused one person to eat alone. If your server tells you there is a problem with a customer's order it is your responsibility to fix the problem, not add to it.

540 South Main Moab, Utah 84532 435-259-4648 FAX 435-259-9824

CATERING SERVICES AVAILABLE

FROM : SMITTY'S GOLDEN STEAK PHONE NO. : 4352599824 Nov. 11 2010 09:55AM P4

DWS 11/10/10 @ 09:23

CLAIMANT Well, what he has written down here is not true.

JUDGE Okay. And I would not exclude the document on the grounds that you disagree with the accuracy of the document. By entering them into the record it does not mean I take everything in them to be true. It simply means I can use them in making my decision if I find them to be helpful. So I would overrule your objection to exclude it on the grounds that you disagree with the accuracy. Do you have any other objection to any of the documents being entered into the record as evidence?

CLAIMANT No.

JUDGE Mr. Smith, any objection to any of the documents being entered into the record as evidence?

SMITH No.

JUDGE Then I'll receive them into the record as evidence. And I'll proceed with the testimony of Mr. Smith. Mr. Smith, can you tell me the beginning date of the Claimant's employment with your company?

SMITH Just one second. Okay. We rehired him on 6/6/2006.

JUDGE And what was his last day of work?

SMITH 10/21.

JUDGE And what was his job title at the time of separation?

SMITH Cook.

JUDGE What was his rate of pay?

SMITH Let me look it up here. It was $12 an hour.

JUDGE Okay. Was the Claimant discharged from his job with the Employer, Mr. Smith?

SMITH Was he what, sir?

JUDGE Was he discharged from his job?

SMITH We took it as no call/no show.

JUDGE All right. And did you fire him for failing to show up to work and failing to call the Employer?

SMITH Yes.

JUDGE When - what was the date of the last incident?

SMTH The 21st of October.

JUDGE Okay. And your testimony is that he did not show up for work that day or call the Employer?

SMITH As in Exhibit 9, he was told that he had to call myself, Lindsey or Teresa, which are managers. He had - we were all around that day. He had - he has all our phone - cell phone numbers in his phone. The reason he was put on this type of a deal - I mean, our policy is that you pretty much cover your shifts. He was put on a thing that he had to be approved by myself, Lindsey or Teresa.

The reason for us putting him on that, in 2010 he worked a total of 169 days. Of those 169 days he was late 116 times. Of those late times, 52 times he was late fifteen to two hours. And that was our reasoning for putting him where he had to call us to be approved for not being at work or being late. Calling the busser, the hostess, the cook was not going to work any more; that we needed to know what was going on. That was the reasoning for putting him on a special deal as far as how he got his shifts covered.

JUDGE All right. Did he call anyone on the 21st to let them know he was not coming in?

SMITH He said he called the hostess. I'm not sure if he did or not. I was not here at the restaurant at the time.

JUDGE Did you ever speak to the hostess to see if he had called?

SMITH I didn't. I think one of the managers did.

JUDGE Okay. Did you know if he had his shift arranged to be covered that day?

SMITH As far as I knew he didn't. But later on he said that he had Fernando coming in. Which Fernando works another job. He cannot come in until - 4:30 to 5:00 is when he normally comes in because of his other job. And we didn't - so we had two to three hours to cover, so we had no idea that Fernando was covering him. The people that worked here in the morning had to stay.

And they've already worked their hours and they're ready to go home. So, you know, that's why we needed - one of the managers needed to know so we could say okay, we know Fernando is coming in. We don't have to worry about running around trying to find somebody.

JUDGE Okay. You probably have read the documents that the Department sent to you. I'm just looking at what's marked as Exhibit Number 11. And the Claimant told the Department that both you and Teresa had approved for him to have time off for a doctor's appointment on October 21st, 2010; that he had spoke to you about a week before that; is that true?

SMITH No, that is not true. Also he has a real habit of making the doctor appointments and never showing up. He goes to reservations to do his doctor appointments. I have one of the managers that was coming into work that day at 3:00 pass him as she was coming into work at 3:00, or a little bit before 3:00. And it was him, and the only reason she really paid attention to that was because she goes, well, he's an hour late again today.

And if he was to go to a doctor's appointment that day, which I understand he did not go to, his drive down there is a two or three-hour drive. So for him to be there at 1:00 - I mean, 3:00 as far as time travel, it wouldn't have been possible if he had gone to his doctor's appointment.

JUDGE When the Claimant was absent on that occasion and you did not know that he was going to be absent; I think you've touched upon this, but what impact does that have or did that have on the Employer?

SMITH Trying to cover his shift. Like I say, we didn't know Fernando was going to come in. Trying to get the other guys to stay. Some of them didn't want to do. One of them had another job to go to. The other one was tired. He had been there since 4:00 that morning. He was ready to go home. He didn't want to spend an extra two or three hours. So we called around trying to find somebody else, and we finally found one person that would come in. Just trying to find people to come in, and after a while it just gets - it got to be a habit.

JUDGE Okay. Did you ever speak to the Claimant about this final incident?

SMITH Yes, I did.

JUDGE What was his explanation as to why he was absent that day and why he had not asked for approval ahead of time?

SMITH What I recall is he just said he had his - how he had covered his shift, and he had done that. And I told him, well, we didn't know about it and we were scramble - all three of us were calling people. And it wasn't the same day that I talked to him, and he was pretty much irate and screaming and hollering and stuff. So I just said that's the way I understand it, and I walked away because I just didn't want the confrontation.

JUDGE Did he ever tell you that he had - that you had given him permission to take that time off when you -

CLAIMANT I do, but it won't be right. So I'll just say no.

JUDGE All right. Let me go ahead and take your testimony, Mr. Vijil. The Employer testified that the last time that you worked for the Employer you began on June 6th of 2006 and your last day was approximately October 21st of 2010; do those dates sound right to you?

CLAIMANT I don't - yeah, probably.

JUDGE All right. Did you work as a cook for the Employer?

CLAIMANT Yeah.

JUDGE Were you earning $12 per hour at the end of your employment?

CLAIMANT Yes.

JUDGE All right. Mr. Vijil, were you absent from work on October 21st?

CLAIMANT Yes.

JUDGE And why were you absent that day?

CLAIMANT I did see the doctor, and I did bring a doctor's statement on my way back. I was told I didn't have a job no more.

JUDGE All right. Did you have prior approval to take that day off from the Employer?

CLAIMANT Yes. I asked Teresa and him. They were both standing together; that I was going to the doctor. And when they signed this - they made me sign this paper. I went back into the office to - I will have - I had my doctor write up - I had them a write a statement from them saying that I was - right now I was not emotionally stable because they were giving me (inaudible) depressant pills and it was causing problems.

JUDGE So when was it that you spoke to Teresa and Mr. Smith?

CLAIMANT A week before I went to the doctor (inaudible).

JUDGE And your testimony was that you asked them if you could have the day off for October 21st to go to the doctor?

CLAIMANT Yes. And then - yeah.

JUDGE And did they tell you that would - that was okay?

CLAIMANT They said to cover my shift.

JUDGE Okay. Did you cover your shift that day?

CLAIMANT I called Fernando, and Fernando said he would cover it because Elpillio (phonetic) goes in at 2:00, and so there's one person on the line until the second person shows up.

JUDGE How many are supposed to be on the line at a time?

CLAIMANT There was supposed to be two on the line, but a backup -

UNKNOWN One person -

CLAIMANT - usually don't get there until about 5:00 - or 4:30.

JUDGE Okay. Did you speak to Mr. Smith about this incident about missing work on October 21st after you were discharged?

CLAIMANT I went down there and I talked to Lindsey, and she said I needed to call her dad. And I called him, and he goes - he just said that, well, you read the application. And I said okay. And then he goes, well, I'll let you know. And then after that I haven't heard from him.

JUDGE Okay. Now -

CLAIMANT Now I had to hear from hearsay from - that I was let go.

JUDGE Okay. Mr. Smith testified that you told him that you thought all you had to do was cover your shift; did you tell him that?

CLAIMANT No, because I already got it approved for going to the doctor a week ago.

JUDGE Okay. Did you call into the Employer's on October 21st?

CLAIMANT Yes, to let them know that I was leaving town and I was going down.

JUDGE Okay. If you already had permission to take that time off, why were you calling in?

CLAIMANT For reasons like this. Because they always say, no, we didn't cover our shift, so we didn't do something. So I just called and I reminded them that I was getting - my shift was going to be covered, and there was no manager on duty.

JUDGE When you cover your shift, are you supposed to cover the entire shift?

CLAIMANT Yeah.

JUDGE Okay. Now isn't it true that Fernando wasn't able to cover your entire shift?

CLAIMANT But I had another lead cook there. Elpillio was there.

JUDGE Was he supposed to work that time anyway?

CLAIMANT Yes.

JUDGE Because he wasn't covering your shift, right; he was covering his own shift?

CLAIMANT But he agreed to cover until I got - until Fernando got there.

JUDGE But didn't he have to work his own shift as well?

CLAIMANT Yeah, but from 2:00 until 4:00 is - there's nothing going on. So all we pretty much do - we clean or we just sit out back.

JUDGE Okay. Now the Employer testified that during the last year that you worked there that you worked 169 days and you were late to work 116 times; is that true?

CLAIMANT I don't know.

JUDGE Were you late a lot?

CLAIMANT Yeah.

JUDGE Okay. Do you recall receiving the letter from the Employer in October about - concerns about you being late to work?

CLAIMANT No. The only letter I got from them is this one that they said I had to sign if I didn't - if I wanted to keep my job.

JUDGE Right. And doesn't that talk about concerns about you being late to work?

CLAIMANT Yeah.

JUDGE Okay. And did you understand that you were required to speak to Teresa, Lindsey or John if you were - needed to take time off work?

CLAIMANT But I did talk to them a week prior before.

JUDGE Okay. When you spoke to Mr. Smith after the 21st, did you tell him that you had already